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IN THE

Supreme Court of the United States

FRED STEIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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FRED STEIN,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered on the 16th day of November, 1959, in the case entitled "FRED STEIN, Appellant, vs. UNITED STATES OF AMERICA, Appellee."

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 271 F. 2d 895. Copies of the opinion and of the judgment are printed as Appendices A and B to this petition.

Jurisdiction.

The judgment of the Court of Appeals was rendered and entered November 16, 1959. Petition for rehearing was denied by order dated December 29, 1959. Application for extension of time within which to file this petition was granted by order of Mr. Justice William O. Douglas, extending the time to file it to and including February 27, 1960.

This Court's jurisdiction is invoked under 28 U. S. C. Section 1254(1). The Court of Appeals had jurisdiction under 28 U. S. C. Sections 1291 and 1294(1). So had the District Court under 18 U. S. C. Section 3231.

Questions Presented.

The questions presented are:

(1) Whether a conflict of interest existed between the Petitioner and his attorney Sweeney who himself had been arrested and was facing criminal prosecution as a dope peddler and briber and who declared his incapacity to proceed and his realization of conflict in representing Stein on parallel narcotics charges.

(2) Whether said attorney was disabled from representation of the Petitioner, by reason of said conflict of interest.

(3) Separately, whether Petitioner was deprived of his free choice of counsel.

(4) Whether the activities of the said attorney purportedly in Petitioner's defense were constitutionally inadequate.

(5) Whether, referring to the foregoing questions, Petitioner was denied his right to have the assistance of Counsel for his defense.

Constitutional Provisions Involved.

The following portion of the Sixth Amendment to the United States Constitution, is here involved:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Procedural Summary.

Petitioner, Fred Stein, was indicted March 5, 1958 by the Federal Grand Jury at Los Angeles, California [Tr. pp. 1-6]. The indictment was on six counts.

Count One charged petitioner with a conspiracy (18 U. S. C., Sec. 371) between him and three "unindicted co-conspirators," Quentin Browning, Clarence Winfrey, and Celeste Winfrey. It was alleged in the indictment that the conspiracy was formed on or about January 1, 1956, and ended on or about July 11, 1957. The conspirators were charged with receiving, concealing, transporting and facilitating the concealment and transportation of heroin and of concealing and facilitating sale of heroin. Seventeen overt acts are alleged as having occurred between January 21, 1956 and July 11, 1957.

Count Two charges petitioner (21 U. S. C., Sec. 174) with having on or about January 21, 1956, sold and facilitated the sale of approximately two ounces of heroin to one of the "unindicted co-conspirators," Quentin Browning. Count Two[1] is a repetition of the first overt act charged in Count One.

Count Three charges petitioner (21 U. S. C., Sec. 174) with having on or about January 21, 1956, facilitated the sale of approximately two ounces of heroin to two of the "unindicted co-conspirators," Clarence Winfrey and Celeste Winfrey. Count Three is a repetition of overt act No. 1 (Count One) and a repetition of Count Two except in Count Three the sale of the same two ounces of heroin is charged as having been made by appellant to the "unindicted co-conspirators," Clarence Winfrey and Celeste Winfrey, instead of to "unindicted co-conspirator," Quentin Browning.

---

[1]The Court dismissed Count Two at the trial.

Count Four charges petitioner (21 U. S. C., Sec. 174) with the sale and facilitation of the sale on February 15, 1956, of approximately three ounces of heroin to "unindicted co-conspirators," Clarence Winfrey and Celeste Winfrey. Count Four charges as a specific offense overt acts Nos. 3, 4, 6 and 7 of Count One.

Count Five charges that petitioner (21 U. S. C., Sec. 174) on September 10, 1956, sold and facilitated the sale of approximately five ounces of heroin to "unindicted co-conspirator," Quentin Browning. Count Four charges as a specific offense overt acts Nos. 8, 9 and 10 alleged in Count One.

Count Six charges that petitioner (21 U. S. C., Sec. 174) on March 3, 1957, sold and facilitated the sale of approximately three ounces of heroin to "unindicted co-conspirators," Clarence Winfrey and Celeste Winfrey. Count Six charges as a specific offense overt Acts Nos. 15 and 16 alleged in Count One.

The case was called for trial September 16, 1958, before the Honorable Peirson M. Hall, Judge, with a jury. [R. T. p. 4]. The jury returned its verdict September 22, 1958, finding the petitioner guilty as charged on Counts One, Three, Four, Five and Six [R. T. p. 67]. Counsel for petitioner, Paul W. Sweeney, announced that he would file a motion for new trial (Rule 33, F. R. Cr. P., 18 U. S. C.). The Court denied petitioner the right accorded him by Rule 33 to file his motion for new trial within five days after the verdict. The court stated that it would hear a motion for new trial if the motion were filed in the afternoon of that day, September 22. At the time the Court made that declaration it was 3:40 P. M. [R. T. pp. 639-640]. The Court then continued the matter of the motion for new trial until 11:00 o'clock September 23, 1958 [R. T. p. 640].

The next day, September 23, the Court denied petitioner's motion for new trial and motion for Judgment notwithstanding the verdict [R. T. p. 70, lines 12-14]. Immediately after the denial of motion for new trial judgment notwithstanding the verdict and on September 23 the Court rendered its judgment sentencing the petitioner to twenty years on Count One, to twenty years on Count Three, the sentences on these two Counts to run concurrently, ten years on Count Four, ten years on Count Five and ten years on Count Six to run consecutively with each other and consecutively with the concurrent twenty year sentences on Counts One and Three, making a total sentence of fifty years [Tr. pp. 70-71]. Petitioner is fifty-four. The sentence is for life with no hope of parole (26 U. S. C., Sec. 237(d)).

Petitioner Stein filed his Notice of Appeal to the United States Court of Appeals for the Ninth Circuit September 26, 1958 [Tr. p. 74]. Judgment of that Court affirming the Judgment below was made and entered November 16, 1959. Petition for Rehearing was filed by petitioner on December 15, 1959, and that Court denied Rehearing on December 29, 1959. That Court, on application of petitioner, stayed the issuance of its Mandate on January 5, 1960, providing "such Petition is filed in the Clerk's Office of the Supreme Court of the United States on or before January 28, 1960. In the event the Petition for Certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States."

Statement of the Case.

Petitioner Stein petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, affirming a Judgment sentencing him to fifty years in the penitentiary. Petitioner is not entitled to parole. If Petitioner's sentence were reduced for good behavior to three-fourths of his fifty year term, Petitioner would be eighty-eight years old at the time of his release.

When the case was called for trial, Attorney Paul M. Sweeney, who appeared for Petitioner at the trial, moved the Court for a continuance [R. T. pp. 4-8] upon the grounds that other counsel who had appeared for Petitioner, Harry Weiss and Arthur Sherman, were not present; that he, Sweeney, was not mentally or physically able to go ahead with the trial as he, himself, was at the time charged in the Superior Court of Los Angeles, California, with a violation of the State Narcotics Law (Cal. Health and Safety Code, Sec. 11500) and that he was also charged in the same information with offering a bribe to State and County officials in connection with the narcotics charge (Cal. Penal Code, Secs. 67 and 67½); that a continuance should be had so as to permit the Petitioner to obtain other counsel in place of Sweeney as he, Sweeney, because of his distressed condition of mind and because of the large amount of adverse publicity which had appeared concerning his, Sweeney's, alleged felonies, did not feel competent to try the case for Petitioner; that he was appearing for the Petitioner at the opening of the trial for the sole purpose of getting a continuance in order that the petitioner might obtain other counsel; that he, Sweeney, could not properly defend petitioner because of the probability that in the defense of petitioner, he, Sweeney, might damage the defense of his

own narcotics case and bribery case pending the Superior Court at Los Angeles. With all deference to the trial court, it is submitted that the Court instead of granting the motion for a continuance in effect compelled the petitioner to sign a designation of Sweeney as his counsel [R. T. pp. 64-66]. The detailed transactions and colloquy in this regard are here set out.

"The Court: Very well.

Will counsel approach the bench, please, with the defendant.

(The following proceedings were had between court and counsel at the bench, with the defendant present, outside the hearing of the jury:)

The Court: In the records here it appears as though you first appeared for this defendant on March 10, 1958, that thereafter an appearance praecipe was filed by Harry Weiss on April 7th. There does not appear to be a substitution of counsel. You appeared again on April 28th and have since from time to time appeared for this defendant in all matters.

Is Mr. Paul Sweeney your counsel, Mr. Stein?

The Defendant: Your Honor, I would like to get another attorney.

The Court: Has he been your attorney?

The Defendant: Yes, he has appeared for me here.

The Court: Has he been your attorney in this case?

The Defendant: No, he has not.

The Court: Was he your attorney on March 10th?

The Defendant: He has made the appearances here.

The Court: Was he your attorney? Did you authorize him to appear for you?

The Defendant: Yes.

The Court: Did you authorize him to appear here at the subsequent times that he did appear?

The Defendant: No. He came up. The Government, I understand, asked for the postponement and that Mr. Sweeney was to make the motions, and he called me—." [R. T. p. 60, line 15, to p. 61, line 19.]

"The Court: Who is your lawyer?

The Defendant: Well, Mr. Weiss was my attorney up until when Mr. Paul Sweeney made his first appearance and Mr. Weiss stepped out.

The Court: Up until Mr. Sweeney appeared?

The Defendant: Yes, sir.

The Court: Mr. Sweeney has been your attorney since June 17?

Mr. Sweeney: We have been co-counsel I think together at the time of the appearance. We were co-counsel at the time of trial setting.

The defendant informed me that since that time Mr. Weiss was no longer representing him.

The Defendant: That is right.

Mr. Sweeney: I asked him about that today, whether he was going to help try this matter or not." [R. T. p. 62, lines 8-23].

"The Court: Have you since discharged Mr. Sweeney?

The Defendant: We discussed it.

The Court: Have you discharged him?

The Defendant: No. That was for the continuance which was for today so I could get other counsel.

The Court: No, this is not August 12th. June 17th to August 12th I do not find any minute in the file since that date. You were here in this Court on August 12th and secured a continuance for resetting.

Mr. Sweeney: Yes, I did. I appeared for that.

The Court: And it was set to this date.

Mr. Sweeney: It was set to this date.

The Court: He was authorized to represent you then?

The Defendant: Yes.

The Court: You have made no move to get any other counsel in the meantime?

The Defendant: I have, yes.

The Court: Have you secured any other counsel?

The Defendant: Yes, sir.

The Court: Yes?

The Defendant: Yes.

The Court: You knew that this case was set on August 12th at this date.

The Defendant: Mr. Sweeney and I discussed it and he told me he wasn't capable, in view of his troubles, to give me the proper defense that I was entitled to. Yes, sir, I talked to some other people in regard to getting another attorney." [R. T. p. 63, line 7, to p. 64, line 9.]

"The Court: I have here an appearance designation of counsel. Now do you refuse to sign it?

The Defendant: (Pause).

The Court: Do you refuse to sign designating Mr: Sweeney as your lawyer?

The Defendant: Yes.

The Court: You do or do not?

The Defendant: I will sign it.

The Court: This is dated March 10th.

Mr. Sweeney: I don't know whether you should consult someone else or not.

(Conference between counsel and the defendant.)

Did you make a telephone call this afternoon to try to get other counsel?

The Defendant: Yes.

Mr. Sweeney: Did you get him?

The Defendant: No." [R. T. p. 64, line 16, to p. 65, line 7].

"Mr. Sweeney: There is no doubt in my mind but that Harry Weiss and myself were representing him at all those times. Now when I talked about representation that was since September, whenever the publicity came out about me, and then I called him and asked him—well, he called me and asked, did I want to continue, and that is the only time the matter of attorneys has come up. At all times though I did think that I was representing him along with the offices of Harry Weiss." [R. T. p. 65, lines 8-16].

The defendant was then advised that witnesses were immediately going to be called, and was asked, in effect, to choose between Sweeney and no lawyer at all:

"The Court: Who is your lawyer?

The Defendant: I talked to Mr. Weiss.

The Court: No, who is your lawyer, not who you talked to. Who is your lawyer?

Mr. Sweeney: I am one of them.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes.

The Court: Very well. You can sit down there at the table and talk to Mr. Sweeney. *I will declare a few moments' recess, before you put any witness on the stand.*

Mrs. Bulgrin: Yes, your Honor.

The Court: You make up your mind whether or not Mr. Sweeney is your lawyer.

Mr. Sweeney: All right, sir." (Emphasis supplied). [R. T. p. 65, line 17, to p. 66, line 6].

Defendant and Mr. Sweeney were then to observe that the Court was about to exert its powers against Mr. Weiss:

"The Court: Is Harry Weiss one of your lawyers?

The Defendant: Yes, sir.

The Court: I will declare a recess. The clerk will call Mr. Weiss and get him over here, wherever he is.

The Defendant: I talked to Mr. Weiss—

The Court: Otherwise I will send the United States Marshal for him.

Is there a United States Marshal present?

The Clerk: Yes, your Honor." [R. T. p. 66, lines 14-22].

Whereupon, the Court showed its feeling regarding Mr. Weiss.

> "Mr. Sweeney: Let me make a call to Mr. Weiss, your Honor. I am going to represent this defendant and I am going to also call Mr. Weiss and find out just what his position is in the matter.
>
> The Court: Mr. Weiss had better get over here. This is not the first time that this has happened, and I sort of have a feeling that Mr. Weiss is playing horse with the Courts." [R. T. p. 66, line 23, to p. 67, line 5].

Mr. Sweeney showed his feeling about representing Stein in the "light of my own situation," "with my own troubles as they are:"

> "Mr. Sweeney: No, your Honor. In all fairness to Mr. Weiss, he advised me Friday that he did not think that he was going to appear in this matter and asked me what I was going to do in the matter, and at that time I advised Mr. Weiss that I was going to seek a continuance in order for Mr. Stein to get another attorney in light of my feeling about this thing, if for no other reason. I think Mr. Stein has been satisfied with my services thus far and is confident to have me continue. But it was just my personal feeling in light of my own situation that just made me wonder whether I would be best at this particular time to try what I think was a very important thing in his life with my own troubles as they are." [R. T. p. 67, lines 6-18].

The Court's response is within the context of the timidity shown by Sweeney in his expression of his "feelings," the criticism of and threat to arrest Mr. Weiss,

the fact that the Court indicated it was about to proceed to trial, and the other circumstances evident in the record.

"The Court: It is up to the defendant to make up his mind." [R. T. p. 67, lines 19-20].

Stein (and Sweeney) were, in effect, now bearing the burden of the absent Mr. Weiss. Stein's answer is not surprising:

"Mr. Sweeney: That I know. I don't think Mr. Weiss is in any way trying to avoid this.

The Court: We went through one case, not before me but before another judge, where Mr. Weiss' office represented a client, they appeared repeatedly before three different judges, they took six days to try it, the defendant was convicted and when it came time for sentence the defendant got up and said that he was not his lawyer at all and had never retained him.

I want to know now from Mr. Stein who your lawyer is.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes, sir." [R. T. p. 67, line 21, to p. 68, line 9].

The assent was formalized without further ado:

"The Court: Very well, you can date that as of today.

The Clerk: Shall I get a new blank, your Honor?

The Court: No, that is all right. Strike it out and date it as of today.

Do you wish Mr. Sweeney to be substituted in place and stead of Harry Weiss?" [R. T. p. 68, lines 10-17].

The Court then ascribed to the defendant a motion to do so. Mr. Sweeney's conflicts continued to show themselves to the Court:

"The Court: Very well. The motion is granted and Mr. Sweeney is substituted as sole counsel for the defendant Stein.

Mr. Sweeney: I think by tomorrow we are going to have another counsel that I will associate in the matter." [R. T. p. 68, lines 18-22].

When the case was thus called for trial September 16, 1958, the only attorney designated of record for petitioner by an appearance praecipe was Harry E. Weiss, 448 South Hill Street, Los Angeles. This praecipe was filed April 7, 1958 and was signed by petitioner Fred Stein and by his attorney, Harry E. Weiss. [Tr. p. 15] Paul W. Sweeney had appeared several times in the case before that on motions and continuances, but he appears to have been doing so for Harry Weiss, as there was no designation of Sweeney as counsel and no appearance praecipe signed until after the opening of the trial September 16, 1958, when the Court in effect compelled Stein to sign a praecipe dated September 16, 1958. [R. T. pp. 67-69; Tr. p. 35].

REASONS FOR GRANTING THE WRIT.

I.

The Determination of the Court of Appeals That No Conflict of Interest Existed Between the Defendant and His Attorney, Sweeney Which Deprived the Defendant of His Right to Have the Effective Assistance of Counsel Guaranteed by the Sixth Amendment, Is Not in Accord With Applicable Decisions of the Court, nor With the Facts, and Is in Violation of the Cardinal Guarantees of the United States Constitution.

In *Glasser v. United States* (1942), 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, this Court announced in interpreting the guaranty of "assistance of counsel" that the Sixth Amendment:

> ". . . Contemplates that such assistance be untrammeled and unimpaired by a Court Order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired." (At p. 70).

In that case, Stewart, the attorney for Glasser, one of several defendants indicted for conspiring to defraud the United States, was requested by the trial Judge to represent one Kretske. Defendant Glasser said that he would like to have his own attorney represent him, alone. After a colloquy between counsel and the Court, the Court appointed Stewart to represent Kretske. Glasser remained silent. Stewart thereafter represented Glasser and Kretske throughout the trial. All of the defendants were con-

victed and the Seventh Circuit affirmed (116 F. 2d 690) This Court granted certiorari. Glasser's conviction was reversed on the sole ground that the "court . . . denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment." (At p. 76).

The main reason this Court reversed was that Stewart, the attorney for Glasser, advised the Court of the possibility that conflicting interest might arise which would diminish Mr. Stewart's usefulness to Glasser, his client.

During the course of that trial certain situations developed which objectively demonstrated this conflict between the attorney and his client (since Stewart failed to defend Glasser vigorously because of the inferences that might have arisen as to the other defendant). The Court independently of the record drew certain inferences to support its conclusion that there were objective demonstrations of a conflict of interest between the defendant, Glasser, and his attorney. (See p. 73).

In addition, this Court states that another consideration pertinent to its decision is the fact that Glasser wished the benefit of the undivided assistance of counsel of his own choice and that such a desire on the part of the accused should have been respected. (At p. 75).

However, in determining whether or not the defendant did have the effective assistance of counsel, guaranteed by the Sixth Amendment, the Court stated:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to

the amount of prejudice arising from its denial. Cf. *Snyder v. Massachusetts,* 291 U. S. 97, 116, 54 S. Ct. 330, 336, 78 L. Ed. 674, 90 A. L. R 575; *Tumey v. Ohio,* 273 U. S. 510, 535, 47 S. Ct. 437, 445, 71 L. Ed. 749, 50 A. L. R. 1243; *Patton v. United States,* 281 U. S. 276, 292, 50 S. Ct. 253, 256, 74 L. Ed. 854, 70 A. L. R. 263. And see *McCandless v. United States,* 298 U. S. 342, 347, 56 S. Ct. 764, 766, 80 L. Ed. 1205. Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the Court."

Even though the appointment of Stewart to represent Kretske was carried out voluntarily with no argument before the Court and with no pressure being asserted by the Court, it was held that the defendant had not waived his right, under the Sixth Amendment.

The case at bar, far more than in the *Glasser* case, demonstrates that the circumstances under which the defendant was represented by counsel deprived him of his right to that effective assistance of counsel guaranteed by the Sixth Amendment, and as well that no free choice of counsel was allowed.

The well settled rule regarding representation by counsel in criminal proceedings, under the Sixth Amendment, guarantees to the defendant in a criminal proceeding in the Federal Court the right to be represented and

heard by counsel of his own choosing. *Johnson v. Zerbst*, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461. Representation by a particular attorney may be under such circumstances as not to meet the constitutional requirements. *Glasser v. United States, supra.* A conflict of interest between the defendant and the interests of the attorney may be such to deprive the accused of the effective assistance of counsel as defined by this Court's decisions.

The prejudice to a defendant from the failure to have the effective assistance of counsel results whether counsel is Court-appointed or selected by the accused. The right "is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States, supra.*

The Court was informed at the commencement of the trial by Sweeney that he felt there was a conflict of interest between his own personal legal involvements (in narcotics charges and attempted bribery charges growing out of the narcotics peddling charge) and the interests of the defendant, who was also on trial for narcotics peddling.

Sweeney expressed a state of mind indicative of an attorney who could not provide that type of effective assistance guaranteed by the Sixth Amendment. We refer *inter alia* to the facts and record set forth *supra*, and to the following quoted passages:

> "Mr. Sweeney: . . . Thirdly, there is a question of the recent publicity which I have received in this affair over on the State side by my arrest on this —what was it, bribery incident—that was widely covered by radio, television and the newspapers, having been carried on the front page of the news-

papers and being discussed over television as well as over the radio.

Mr. Stein came to me and asked me, did I feel in light of all that had recently happened, was I in the proper mental attitude to represent him, and I informed him that I was not.

I felt that because of the nature of this kind of charge and the publicity that this case might get, it might materially affect any defense that I might have as to my action if I were to be connected in any way to any sort of situation like that.

"The Court: That occurred several weeks ago?

Mr. Sweeney: It occurred two weeks ago." [R. p. 7, line 11, to p. 8, line 2].

"Mr. Sweeney: I would like the record to indicate that I am totally both mentally and physically unable to go to trial." [R. T. p. 9, line 25, to p. 10, line 2].

The fact that Sweeney had been arrested and faced trial on a similar and related charge of peddling dope and attempted bribery certainly produced something less than an "untrammeled and unimpaired" defense without conflicting interest.

In *Berry v. Gray*, 155 Fed. Supp. 494 (1957), the Court held that the appearance of a conflict of interest between the defendant and his attorney demanded a reversal of the Judgment. The Court did not find it necessary to concern itself with deciding whether or not the defendant was prejudiced by the attorney who represented him but merely inquired into whether or not the attorney had a conflict of interests wih defendant. The Court decided

that if such a conflict of interest existed, then the defendant could not have received the "effective assistance" of counsel guaranteed under the Sixth Amendment.

In *Butzman v. United States* (1953), 205 F. 2d 343, certiorari denied, 74 S. Ct. 50, 346 U. S. 828, 98 L. Ed. 353, the United States Court of Appeals, Sixth Circuit, reversed and remanded for hearing for defendant Craig where defendant Butzman owned the company and where Butzman and Craig used the same attorney. It was suggested that conflict of interest made dual representation improper in that it was to the interest of Butzman to shift responsibility to one or more of his employees (Craig was controller—employee of the company); and that it may have been to Butzman's interest, when faced with unfavorable newspaper publicity, to have waived a jury trial. The reviewing Court suggested that there was no such reason for waiving a jury trial on the part of Craig. The Court decreed that the trial Court should hold a hearing to determine whether to reverse for new trial on the ground of deprivation of effective assistance of counsel (205 F. 2d 343, 351).

In 1954 the same matter came before the same Appellate Court. (*Craig v. United States*, 217 P. 2d 355.) The District Court had held its hearing and, although it found that a conflict of interest had in fact developed during the trial, decided that said conflict did not invalidate the Judgment against Craig.

But the Appellate Court reversed and remanded the cause for new trial, stating that

> "Courts indulge every reasonable presumption aginst waiver of the fundamental right to counsel of one's own choosing . . . in determining whether such deprivation has occurred, it is immaterial

whether such counsel has been appointed by court or selected by the accused in absence of facts constituting waiver of the right to such assistance."

We submit that the *Craig-Butzman* cases, decided under the Sixth Amendment, show that where a conflict of interest is operative, that very conflict can serve as the ground for finding that the rights under the Sixth Amendment to counsel have been abridged. It is worthy of note that in these cases, the reviewing Court required very little showing as to the manner in which such deprivation reflected against the interests of defendant Craig. Neither does the Court in that case find difficulty in reversing, though the facts of conflict were realized or realizable by Craig and by the attorney. The fact of the conflict is the dominant fact, we believe, which explains the decisions.

It is worth noting that the quantity of evidence indicative of guilt is not a controlling factor in determining whether reversal is required. In *Coplon v. United States* (1951), 191 F. 2d 749, 89 U. S. App. D. C. 103, certiorari denied, 72 S. Ct. 363, 342 U. S. 926, it is shown that no matter how overwhelming is the evidence of guilt, if the accused is denied the *effective* assistance of counsel, he may not legally be found guilty.

Was Stein denied the effective assistance of counsel? We have dealt with the details above. A perspective view of the total transaction confirms that such deprivation and denial has occurred:—

1. The lawyer was fearful. He expressed his fears to the Court. It was his belief and his apprehension that his engagement in this cause might endanger that lawyer's position in his own later criminal trial. It was that

lawyer's further fear and apprehension that his involvement personally in criminal defense, the subject of newspaper publicity and, probably, of knowledge of the jury, could gravely contaminate the proceedings below. The exact means by which the normal machinery and processes of justice might be affected could here be the subject of extensive analysis. Knowledge by a jury that the very lawyer defending a narcotics defendant is himself under suspicion, or more, for similar alleged activities, or that the lawyer might be otherwise criminally involved can be, we submit, a ready contaminant of the delicate balance of impartiality required of jurors. That a hard-fought contest made by the lawyer in defense of his client might concomitantly produce a less quiet and more publicized trial, must be a consideration in that lawyer's mind. Repercussions of such publicity, and of such hard fighting, affecting his own liberty and professional status via the later criminal proceedings against him is a mechanism which he might here have considered, and which consideration might have weakened and moderated his defense of a client, the Petitioner herein. Counsel in terror is no counsel at all.

2. The Petitioner should not have been required to be represented by an attorney who was not serving the client's best interests only. An attorney in a situation such as the case at bar would be, and here by his own declaration was, affected by fears of hostile and retaliatory actions that would endanger his own freedom and liberty if he acted too vigorously in his examination of the law enforcement officers testifying for the prosecution.

3. The defendant was forced to accept a lawyer who was vitally concerned with the application of narcotic laws to his own personal defense rather than only in their application to the facts of the case at bar.

4. The defendant was placed in an embarrassing position of being represented and being forced to rely upon a lawyer who had been arrested and who faced further legal proceedings in a State court in Los Angeles as a dope peddler and briber. The attorney was serving cross-purposes of defending his own action and defending the accused.

II.

Although Decisional Law Indicates That the Sixth Amendment Was Violated in the Case at Bar, There Is No Definitive Case Dealing Specifically With the Issue Involved Here; That Is, Whether or Not the Conflict of Interest Between an Attorney and His Client Based on the Attorney's Fear of Affecting His Own Defense in His Own Later Criminal Trial and Related Issues, Requires a Trial Judge to Order a Change of Counsel if Aware of Such Conflict.

In recent years there has been increased recognition of the protection afforded by the scope and coverage of the Sixth Amendment. Numerous decisions of this Court and of the Circuit Courts have jealously guarded the rights of an accused in criminal trials in Federal Courts to have the efficient assistance of counsel for their defense. And the cases have insisted that any indication that a conflict in interest existed between the accused and his attorney required the Appellate Courts to declare any Judgment of conviction void.

In the case at bar, it is apparent after considering the position that counsel was placed in by circumstances which arose immediately before trial and which were presented to the Court, that his feelings were deeply involved in his own legal defense after being arrested; that

his attitude toward the defendant's case was materially hampered and that his ability to represent the defendant was clouded by numerous personal reasons and factors which were unrelated to the actual defense of Mr. Stein, and that an actual conflict of interest was created between the attorney and the client.

Little reflection is necessary to appreciate the internal strife which prompted the attorney to state before the Court that he was "totally both mentally and physically unable to go to trial."

> "Mr. Sweeney: I would like the record to indicate that I am totally both mentally and physically unable to go to trial." [R. T. p. 9, line 25, to p. 10, line 2].
>
> "Mr. Sweeney: I am not denying the fact that I have appeared and represented the defendant. I just wanted the record to indicate my position in the matter.
>
> The Court: I am sorry that I cannot agree with you, counsel. We will go to trial." [R. T. p. 10, line 23, to p. 11, line 2].

In the following cases the interests of the attorney were in conflict with the defendant's because of some involvement with a third party.

Glasser v. United States, supra;

Craig v. United States (6 Cir. 1954), 217 F. 2d 355;

Dist. of Columbia v. Scott (1954), 94 U. S. App. D. C. 227, 214 F. 2d 860;

Berry v. Gray (D. C. Ky. 1957), 155 Fed. Supp, 494;

United States v. Harris (1957), 155 Fed. Supp. 17.

The Appellate Courts ordered the convictions declared void because of the conflicts. Is there any less reason to do so, in justice and reason, because the conflict is caused by an involvement between the attorney as a servant to the client and with himself as an accused dope peddler?

In the array of possible conflicts of interest in terms of their corrosive strengths, what indeed could be more devastating and corrosive to a proper defense of a client than a felt conflict with the attorney's own freedom, status, livelihood and professional career?

This case thus presents an opportunity to this Court to declare the rules by which trial Courts are to preserve and protect the rights of accused individuals to have effective assistance of counsel as provided in the Sixth Amendment to the Constitution.

III.

Because of the Conflict of Interest Between the Attorney and the Defendant, Serious Prejudice Was Suffered by the Defendant During the Course of the Trial Which Violated the Sixth Amendment and the Decisions of This Court.

Some further objective manifestations of attorney Sweeney's internal burden between himself and the defendant follow:

A. Attorney Sweeney failed to move the Court, after the Government's witnesses, Quentin Browning, Clarence Winfrey, Celeste Winfrey, William C. Gilkey, William R. Farrington, James H. Mulgannon and Lawrence Katz, had testified, to compel the Government to produce any statement made by the witnesses, and each of them, which statement or statements relate to the sub-

ject matter on which the witnesses and each of them had testified. (18 U. S. C., Sec. 3500(b).)

> "(b) After a witness called by the United States (in a criminal case) has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

B. Attorney Sweeney failed to produce vital and material evidence that appellant was in New York from the 5th to the 19th of September, inclusive, 1956. [R. T. pp. 373-378, 434]. The appellant offered to prove an alibi that he was in New York on September 10, 1956, which is the time laid in Count Five. Browning testified in support of Count Five [R. T. p. 124] that he came down from San Francisco to Los Angeles at the time charged in Count Five, purchased five ounces of heroin from appellant and took the heroin back to San Francisco and sold it.

To prove that appellant was in New York at the time, Sweeney offered a letter from Vincent J. Dolzen, the general manager of the Hotel Seymour, 50 West 45th Street, New York, dated April 18, 1958. [Deft. Ex. E for Iden.] Defendant's Exhibit E showed that Stein was in New York City at the Seymour Hotel at all times

from September 6 to September 19, inclusive, 1956, which would have been a complete answer to Browning's testimony that he purchased five ounces of heroin from appellant on September 10th. Appellant denied the alleged sale and all other alleged sales to Browning and to the Winfreys or anyone else. [R. T. p. 448].

The Court sustained the Government's objection to the admission of this letter which would have been a complete acquitance of appellant on Count Five. *The Court sustained the objection to the letter on the ground that the letter was hearsay.* Attorney Sweeney or Attorney Weiss or Attorney Sherman, or some of the multiple attorneys for the appellant who have been connected with the case, had the letter in their possession from its date of April 18, 1958. Any one of them should have known that it was inadmissible as hearsay yet the deposition of Vincent J. Dolzen was not taken, nor was he asked to appear as a witness on behalf of defendant. If Dolzen's deposition had been taken or had he appeared as a witness it would have established the falsity of Browning's testimony as to the alleged sale of September 10, 1956, for which he claims he paid appellant $3,000.00 and would have required a jury to treat the rest of his testimony with suspicion.

C. The general tenor of Mr. Sweeney's representation indicates the internal burden with which he found himself due to the conflict of interest between the defendant and himself concerning the legal involvements that he faced.

Conclusion.

The legal and human importance of the matters and questions to be raised in the Petition for Certiorari to this Court which here will determine whether a man may spend the rest of his life in prison in consequence of procedures conducted, and, on appeal sanctioned, we shall assert, in violation of cardinal guarantees of the United States Constitution and in conflict with applicable decisions of this and other Courts of the United States, is sufficient reason we urge for this court to review the Judgment and conviction below, and clarify and settle those important matters and questions. It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. NEBLETT, and
GERALD H. GOTTLEIB,
Counsel for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

Fred Stein, Appellant, vs. United States of America, Appellee. No. 15,309. Nov. 16, 1959.

Appeal from the United States District Court for the Southern District of California.

Before: Stephens, Martin and Orr, Circuit Judges.

Orr, Circuit Judge:

The principal question for determination in this case is whether appellant Stein at the trial in which he was convicted received the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. During the course of preliminaries to the actual trial, at least three lawyers of his own choosing appeared —a Mr. Weiss, a Mr. Sherman and a Mr. Sweeney. Of the three, Mr. Sweeney seems to have made more court appearances. Three continuances were granted. The last continuance was for a period from August 12th to September 16th. Mr. Sweeney was instrumental in securing the third continuance. On the day last set for trial, appellant and his counsel Sweeney appeared. They asked for a fourth continuance on the following grounds: that counsel was unprepared since he had learned only three days earlier that the trial would be held at such time that there was a variance between the trial memorandum submitted by the government and the indictment and that counsel was not in the right state of mind to adequately defend appellant because of certain charges which had recently been made against him. The court in the exercise of its discretion denied the motion for a fourth continuance.

The first ground is without merit. Mr. Sweeney was present at the time of the setting of the case when the

third continuance was granted and one month elapsed between the third continuance and the time of trial. In disposing of the second ground, the trial court ruled that if there was a variance between trial memorandum and the indictment the proper remedy was to object when the government sought to introduce evidence on the points in question. We think the court was correct in this ruling. The ground most strenuously urged was the assertion by Mr. Sweeney that he was not mentally and physically able to adequately defend the appellant. In this connection, we quote the court proceedings in note 1.[1] The

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[1]"Mr. Sweeney: * * * Thirdly, there is a question of the recent publicity which I have received in this affair over on the state side by my arrest on this—what was it, bribery incident—that was widely covered by radio, television and the newspapers, having been carried on the front page of the newspapers and being discussed over television as well as over the radio.

Mr. Stein came to me and asked me, did I feel in light of all that had recently happened, was I in the proper mental attitude to represent him, and I informed him that I was not.

I felt that because of the nature of this kind of charge and the publicity that this case might get, it might materially affect any defense that I might have as to my action if I were to be connected in any way to any sort of situation like that.

The Court: That occurred several weeks ago?

Mr. Sweeney: It occurred two weeks ago.

The Court: It occurred long enough ago that some change in counsel should have been made by this time.

What is your position concerning this, Mrs. Bulgrin?

Mrs. Bulgrin: Your Honor, we strenuously urge that the case go to trial. It has been pending a long time.

The Court: It has been pending since March 4th?

Mrs. Bulgrin: Yes.

The Court: This will be the fourth continuance. * * * I don't think there is sufficient grounds for a continuance. We will proceed to trial. * * * It has been pending since March 4th and must be disposed of and this is the fourth continuance requested. * * *

Mr. Sweeney: I would like the record to indicate that I am totally both mentally and physically unable to go to trial."

alleged mental and physical disability was asserted to be the result of publicity Mr. Sweeney had received in connection with his arrest on a narcotics charge. We find no abuse of discretion by the court in refusing the fourth application for a continuance. As to the question of whether Mr. Sweeney was in fact in a mental and physical condition to represent appellant, we as a reviewing court are privileged to view the question in the light of events subsequent to the ruling, which will be more fully developed later. After the denial of the continuance, the court proceeded to empanel the jury. Thereafter it was brought to the attention of the court that Mr. Weiss was the attorney of record for appellant and, understandably, it concerned itself with getting the record straightened out.[2] Appellants claim coercion. An analysis

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[2]In order that the court's disposition of this matter be fully understood, a copy of the proceedings follows:

"The Court: * * * Is Mr. Paul Sweeney your counsel, Mr. Stein?

The Defendant: Your Honor, I would like to get another attorney.

The Court: Has he been your attorney?

The Defendant: Yes, he has appeared for me here.

The Court: Has he been your attorney in this case?

The Defendant: No, he has not.

The Court: Was he your attorney on March 10th?

The Defendant: He has made the appearances here.

The Court: Was he your attorney? Did you authorize him to appear for you?

The Defendant: Yes.

* * *

The Court: Is Mr. Harry Weiss still your lawyer?

The Defendant: No.

The Court: Who is your lawyer?

The Defendant: Well, Mr. Weiss was my attorney up until when Mr. Sweeney made his first appearance and Mr. Weiss stepped out.

The Court: Up until Mr. Sweeney appeared?

The Defendant: Yes, sir.

* * *

of what occurred convinces us that such a contention cannot be sustained. We are impressed by the evident fairness of the court in declaring a recess so that appellant and Mr. Sweeney could confer; its offer to have Mr. Weiss produced in court; and finally the statements of Mr. Sweeney after he and appellant had conferred privately. Sweeney stated to the court, among other things, ". . . I am going to represent this defendant . . . I think Mr. Stein is satisfied with my services thus far and is confident to have me continue." The court then questioned appellant:

> "* * * I want to know from Mr. Stein who your lawyer is.
>
> The Defendant: Mr. Sweeney.
>
> The Court: Mr. Sweeney is your lawyer?
>
> The Defendant: Yes, sir."

The Court: Was Mr. Sweeney your attorney then?
The Defendant: Yes.
The Court: Have you since discharged Mr. Sweeney?
The Defendant: We discussed it.
The Court: Have you discharged him?
The Defendant: No.

* * *

The Court: Have you told Mr. Sweeney all the facts in this case?
The Defendant: Yes, sir.
The Court: He has advised you of the law and as to your rights?
The Defendant: Yes.
The Court: I have here an appearance designation of counsel. Now do you refuse to sign it?
The Defendant: (Pause).
The Court: Do you refuse to sign designating Mr. Sweeney as your lawyer?
The Defendant: Yes.
The Court: You do or do not?
The Defendant: I will sign it.
The Court: This is dated March 10th.
Mr. Sweeney: I don't know whether you should consult someone else or not.
(Conference between counsel and the defendant.)

We are left with the conviction that the sole purpose of injecting the alleged inability of Mr. Sweeney to conduct the trial was to secure a continuance.

The American Civil Liberties Union of Southern California has been permitted to file an amicus curiae brief. They make the contention that a conflict of interest existed between Mr. Sweeney and his client. If such were the

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Did you make a telephone call this afternoon to tr to get other counsel?

The Defendant: Yes.

Mr. Sweeney: Did you get him?

The Defendant: No.

Mr. Sweeney: There is no doubt in my mind but that Harry Weiss and myself were representing him at all those times. Now when I talked about representation, that was since September, whenever the publicity came out about me, and then I called him and asked him—well, he called me and asked, did I want to continue, and that is the only time the matter of attorneys has come up. At all times though I did think that I was representing him along with the offices of Harry Weiss.

The Court: Who is your lawyer?

The Defendant: I talked to Mr. Weiss.

The Court: No, who is your lawyer, not who you talked to. Who is your lawyer?

Mr. Sweeney: I am one of them.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes.

The Court: Very well. You can sit down there at the table and talk to Mr. Sweeney. I will declare a few moments' recess, before you put any witness on the stand.

Mrs. Bulgrin: Yes, your Honor.

The Court: You make up your mind whether or not Mr. Sweeney is your lawyer.

* * *

(The following proceedings were resumed in open court:)

* * *

The Court: Is Harry Weiss one of your lawyers?

The Defendant: Yes, sir.

The Court: I will declare a recess. The clerk will call Mr. Weiss and get him over here, wherever he is.

The Defendant: I talked to Mr. Weiss—

The Court: Otherwise I will send a United States Marshal for him.

Is there a United States Marshal present?

fact, under the holding of the Supreme Court of the United States in Glasser v. U. S., 315 U. S. 60 (1942) we would not search the record to determine the adequacy of the assistance of counsel received by appellant. But we are unable to find a conflict of interest. An examination of the cases discloses quite a different situation than we have here. See Glasser v. U. S. supra, (one

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The Clerk: Yes, your Honor.

Mr. Sweeney: Let me make a call to Mr. Weiss, your Honor. I am going to represent this defendant and I am also going to call Mr. Weiss and find out just what his position is in the matter.

The Court: Mr. Weiss had better get over here. This is not the first time that this has happened, and I sort of have a feeling that Mr. Weiss is playing horse with the courts.

Mr. Sweeney: No, your Honor. In all fairness to Mr. Weiss, he advised me Friday that he did not think that he was going to appear in this matter and asked me what I was going to do in the matter, and at that time I advised Mr. Weiss that I was going to seek a continuance in order for Mr. Stein to get another attorney in light of my feeling about this thing, if for no other reason. I think Mr. Stein has been satisfied with my services thus far and is confident to have me continue. But it was just my personal feeling in light of my own situation that just made me wonder whether I would be best at this particular time to try what I think was a very important thing in his life with my own troubles as they are.

The Court: It is up to the defendant to make up his mind.

Mr. Sweeney: That I know, I don't think Mr. Weiss is in any way trying to avoid this.

The Court: We went through one case, not before me but before another judge, where Mr. Weiss' office represented a client, they appeared repeatedly before three different judges, they took six days to try it, the defendant was convicted and when it came time for sentence the defendant got up and said he was not his lawyer at all and had never retained him.

I want to know now from Mr. Stein who your lawyer is.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes, sir.

The Court: Very well. * * * Do you wish Mr. Sweeney to be substituted in place and stead of Harry Weiss?

The Defendant: Yes, sir.

The Court: Very well. The motion is granted and Mr. Sweeney is substituted as sole counsel for the defendant Stein."

* * *

lawyer represented co-defendants whose interests conflicted).; Craig v. U. S., 217 F. 2d 355 (6th Cir. 1954) (company counsel represented an employee and his employer whose interests conflicted); Scott v. District of Columbia, 214 F. 2d 860 (D. C. Cir. 1954) (defense lawyer on other occasions had represented witnesses who testified against defendant); Berry v. Gray, 155 F. Supp. 494 (D. Ky. 1957) (defense lawyer worked part time for prosecution in other cases). The somewhat eloquent argument of amicus curiae to our minds is more a further argument as to the alleged incapacity of Sweeney than a disclosure of adverse interest. No adverse interest appearing, we may turn to the record to determine the kind of defense appellant did get. Thomas v. U. S., 252 F. 2d 182 (9th Cir. 1958). See also Sanchez v. U. S. 256 F. 2d 73 (1st Cir. 1958); U. S. v. Yager, 220 F. 2d 795 (7th Cir. 1955). Our consideration of the record leaves us with the same view expressed by the trial court, that ". . . I know of nothing that any other or additional counsel could have done that you, Mr. Sweeney, didn't do in the protection of this defendant's rights. The case was tried skillfully and adroitly on behalf of defendant by you . . ." We ask the question, what defenses were open to a defendant where the witnesses were fellow law breakers other than to attack their credibility? Mr. Sweeney did this by an able cross-examination. In this examination he exhibited no terror. He was alert and prompt with objections and forceful in argument. Our experience as trial judges for many years, from which we cannot disassociate ourselves, convinces us that appellant received a better than average defense and that his interests were fully and expertly protected. Any misapprehensions that Mr. Sweeney may have had along these lines were unfounded.

Appellant attempts to point out certain instances in which Mr. Sweeney was remiss in his duty. Appellant says Sweeney must have been ignorant of Section 3500 (b) of Title 18 U. S. C., or the case of Jenks v. U. S., 353 U. S. 657 (1957), because he did not demand the production of government witnesses' pretrial statements. If he was ignorant of the right to make such a demand, it could not be because of his alleged frame of mind because of a pending indictment. It would have been due to a gap in his general education, which is not urged. Nor is it apparent. The presumption we indulge is that Sweeney was aware of the section but that the merits of his client's case did not require production of such statements. Appellant set up as a defense that he was in New York City at the time one of the offenses charged in the indictment is alleged to have taken place. Mr. Sweeney offered in evidence a letter from the manager of the hotel in which appellant stayed in New York only to corroborate testimony given by appellant's wife and daughter. The offer of the letter was rejected. Appellant now claims that had Sweney been alert to his duty he would have foreseen the incompetency of the letter and made arrangements for a deposition. The taking of a deposition was completely unnecessary, however, as the original registration card, the best evidence, was in evidence.

It is said the evidence is insufficient to sustain the conviction. The credibility of the witnesses was for the jury. If they believed them, which they evidently did, the evidence is overwhelming. We encounter a tendency, not so much urged here, in cases where witnesses are of the same ilk as a defendant to charge the jury with a dereliction of duty in that they convict because of the char-

acters involved. We are in entire disagreement with such a theory. We find that juries take their duties seriously and as a rule do a good job.

Judgment Affirmed.

(Endorsed:) Opinion. Filed Nov. 16, 1959.

PAUL P. O'BRIEN,

Clerk.

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Fred Stein, Appellant, vs. United States of America, Appellee. No. 16,309.

Judgment.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On Consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment.

Filed and entered: November 16, 1959.

PAUL P. O'BRIEN, Clerk.

FILE COPY

FILED
MAR 30 1960
JAMES R. BROWNING, Cl

No. 791

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRED STERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

MALCOLM R. WILKEY,
Assistant Attorney General,

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 737

FRED STEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A; A 3-10)[1] is reported at 271 F. 2d 895.

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1959 (Pet. App. B; A 11). A pe-

[1] "A" designates the separately paginated volume containing the proceedings in the court of appeals. "P.T." refers to the one volume pre-trial proceedings. "T" denotes the 4-volume trial transcript.

tition for rehearing was denied on December 29, 1959 (A 12). On January 18, 1960, Mr. Justice Douglas extended the time for the filing of a petition for a writ of certiorari to and including February 27, 1960. The petition was filed on February 26, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was denied the effective assistance of counsel.

STATEMENT

On March 5, 1958, a six-count indictment was returned in the United States District Court for the Southern District of California, charging that petitioner engaged in a narcotics conspiracy from January 1956 until July 1957 (count 1),[2] and that, during 1956 and 1957, he committed substantive narcotic offenses in violation of 21 U.S.C. 174 (Counts 2-6) (P.T. 1-6).

After a jury trial, petitioner was convicted on counts 1, 3, 4, 5 and 6 (T 637-638).[3] He was sentenced, as a subsequent narcotics offender (T 647-648), to a total of 50 years imprisonment:—20 years on count 1, 20 years on count 3, to run concurrently

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[2] Quentin Browning, Clarence Winfrey and Cele e Winfrey were named, but not indicted, as co-conspirators (P.T. 1-3).

[3] On motion of petitioner's counsel, count 2 was dismissed by the trial court at the close of the government's case (T 349-350).

with the sentence imposed on count 1, and 10 year consecutive sentences on counts 4, 5 and 6 (T. 651). The Court of Appeals unanimously affirmed (A 3-10).

The Pre-Trial Proceedings:

On Tuesday, September 16, 1958, the date for petitioner's trial, Mr. Paul Sweeney, appearing as his counsel, moved for a continuance, asserting that, about two weeks before, he had been arrested on the "State side" on a "bribery incident", and that he had informed the petitioner that, because of this, he was not in a proper state of mind to represent him (T 7). Observing that counsel had been arrested "long enough ago" so that a change of counsel "should have been made by this time", that the case had been pending since March 4, 1958, that counsel had represented petitioner since April 28, 1958, and that, if granted, this would be the fourth continuance, the court denied the motion (T 7-11). A jury was then empanelled (T 11-53), with Mr. Sweeney taking active part, inquiring for cause on two occasions (T 36, 41), and excusing four jurors peremptorily (T 39, 41, 44, 46).

Following the government's opening argument (T 54-60), there was further discussion, outside the presence of the jury, concerning the request for a continuance. The trial judge first noted that Mr. Sweeney had appeared for petitioner on March 10, 1958 (five days after the indictment was filed), and that, although a formal written notice of appearance had been filed for petitioner by Harry Weiss on April 7, 1958. Mr. Sweeney, since April 28, had appeared

for petitioner "in all matters" (T 60-61).[4] The court then questioned petitioner as to whether Mr. Sweeney made prior appearances in his behalf, whether Mr. Weiss was still his attorney, whether he had discharged Mr. Sweeney, and whether he had obtained other counsel. Petitioner stated that he had authorized Mr. Sweeney to appear for him on prior occasions, that Harry Weiss "stepped out" when Mr.

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[4] The history of the pre-trial proceedings prior to September 16, 1958 are as follows:

(1) On March 10, 1956, the case was placed on the calendar and petitioner was arraigned. He was represented by Paul Sweeney, who was granted a continuance until March 24, 1958, for the plea (P.T. 10).

(2) On March 24, 1958, Arthur Sherman appeared as counsel for petitioner and the cause was continued until April 7, 1958 (P.T. 13).

(3) On April 3, 1958, a motion for reduction of petitioner's bail was heard and granted. Paul Sweeney appeared as counsel (P.T. 14).

(4) On April 7, 1958, Harry Weiss appeared for petitioner and the cause was continued until April 21, 1958 (P.T. 16). On April 7, Mr. Weiss had filed a formal notice of appearance. (P.T. 15).

(5) On April 15, 1958, a motion for a bill of particulars was filed in behalf of petitioner by Arthur Sherman (P.T. 17-20).

(6) On April 28, 1958, petitioner, represented by Paul Sweeney, entered a plea of not guilty to all the counts, and the motion for the bill of particulars was withdrawn. The cause was set for trial on June 17, 1958 (P.T. 33).

(7) On June 17, 1958, Paul Sweeney appeared for petitioner, and on his motion a continuance was granted and jury trial was set for August 12, 1958 (P.T. 34).

(8) On August 12, 1958, Paul Sweeney again appeared for petitioner and secured a continuance in the trial until September 16, 1958 (T 63).

Sweeney made his first appearance, and that, although he "discussed it" with Mr. Sweeney, he had not discharged him. Petitioner further stated that, when Mr. Sweeney told him "he wasn't capable, in view of his troubles," he had spoken to some other people about obtaining another attorney (T 62-64). The following colloquy then occurred (T 64):

The Court: Have you told Mr. Sweeney all the facts in this case?

The Defendant: Yes, sir.

The Court: He has advised you of the law and as to your rights?

The Defendant: Yes.

The Court: I have here an appearance designation of counsel. Now do you refuse to sign it?

The Defendant: (Pause)

The Court: Do you refuse to sign designating Mr. Sweeney as your lawyer?

The Defendant: Yes.

The Court: You do or do not?

The Defendant: I will sign it.

At this point, Mr. Sweeney stated that he did not know whether petitioner should obtain other counsel or not, and the court declared a short recess so that petitioner might decide whether he wanted Mr. Sweeney as his lawyer (T 65-66). Shortly after this recess, the jury having retired, the court again questioned petitioner as to the status of Harry Weiss in the case. When told that he was one of petitioner's lawyers, the court stated that he would call Mr. Weiss and "get him over here" (T 66); and that he would send a United States Marshal for him, because

he had the feeling that Mr. Weiss was "playing horse with the courts".[5] (T 66-67). Mr. Sweeney then observed that Mr. Weiss had told him on the previous Friday that he did not think he would appear. He further stated: "I think Mr. Stein has been satisfied with my services thus far and is confident to have me continue. But it was just my personal feeling in light of my own situation that just made me wonder whether I would be best at this particular time to try what I think was a very important thing in his life with my own troubles as they are" (T. 67). The court then observed it was up to the petitioner to "make up his mind" (T. 67). The following discussion then occurred (T 68):

The Court: * * * I want to know now from Mr. Stein who your lawyer is.

The Defendant: Mr. Sweeney.

The Court: Mr. Sweeney is your lawyer?

The Defendant: Yes, sir.

* * * *

The Court: * * * Do you wish Mr. Sweeney to be substituted in place and stead of Harry Weiss?

The Defendant: Yes, sir.

The Court: Very well. The motion is granted and Mr. Sweeney is substituted as sole counsel for the defendant Stein.

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[5] As explained by the trial judge, he had particular reference to a prior case in which Mr. Weiss' office represented a defendant, before three judges, in a six-day trial. After conviction, when it came time to impose sentence, the defendant said that Weiss was not his lawyer and that he had never retained him (T 67-68).

The Government's Evidence:

1. In early January 1956, "Duke" Browning, who had become acquainted with petitioner in 1948 at McNeil Island Penitentiary while they were both incarcerated there on narcotic convictions (T 70, 132, 140-141, 410-411, 451-452), contacted petitioner, in Los Angeles, advised him that he had a client for heroin, and asked if he could purchase some (T 70-72). Petitioner told Browning that if he had the money he could go East and get a "kilo" of heroin (approximately 35 ounces). After a number of meetings between the two, it was agreed that Browning would give petitioner $5,000 ($3,000 of which he had obtained from a prospective purchaser), and, with another $2,000 that petitioner had borrowed, petitioner would go East and obtain the heroin (T 71-76, 133-139). They further agreed to put the heroin so obtained in a "pool" and distribute it as partners, with Browning acting as the contact man (T 77-78). Browning next saw petitioner, about 10 days later (approximately January 17 or 18, 1956), and was told that the trip had been successful and petitioner would have the package the next day (T. 79).[6] The next evening, Browning went to a motel room rented by petitioner and was shown the "merchandise". Petitioner told him that it would "test out close to 90%" pure heroin (T 80, 84, 86). The two men then proceeded to spend the rest of the night "cutting"[7] a

[6] Petitioner thereafter told Browning that he had obtained the heroin in New York (T 139).

[7] A process in which the heroin is diluted by adding milk sugar to it (T 81, 86).

quarter of the "kilo". According to Browning, petitioner was not satisfied to cut it "one for one", because he did not think that their customers were entitled to such a grade for the price they had agreed to sell it for. They therefore cut it further, placed the heroin into one ounce packages and then into glassine bags. When they had finished, their yield was approximately 20 one-ounce packages of heroin from the quarter of a "kilo" cut (T 80, 84-87). They agreed that each one-ounce package was to sell for $350 (T 92).

During the time that petitioner had been absent from Los Angeles, Browning had contacted Clarence Winfrey and informed him that he knew of something Winfrey might be interested in and would know for certain "in a few days" (T 90, 190-193). The night that petitioner returned, Browning contacted Winfrey again and was told that the latter was interested but was short of money (T 90, 193-194). At the meeting at the motel, Browning advised petitioner of Winfrey's interest, and, after they "pro and conned it", they agreed to let him have three ounces at $350 per ounce, one ounce to be paid for immediately and the balance of $700 to be paid when Winfrey sold the merchandise (T 90-93, 95, 103). Browning also informed petitioner that he had another customer for 10 "pieces" of "stuff",[8] who had $3,000 he wanted to spend. The next day,

[8] In the vernacular of the narcotics traffic, "piece" means an ounce and "stuff" means heroin (T 93-94).

Browning sold the 10 "pieces" for $3,000, as he and petitioner had agreed. (T 93-94, 96-97).[9]

On the same day (about January 19, 1956), Browning delivered three "pieces" to Winfrey at his home, for which he received $350 in cash (Count 3). (T 96, 111, 181, 195-196, 198). Winfrey testified to the receipt of the heroin, and testified further that after he cut the three ounces "[n]ot quite 50 per cent" with milk sugar, he sold it at $200 per ounce (T 196-197, 199).

Thereafter, Browning returned to San Francisco and next saw petitioner some time in February to pick up 12 "pieces" of heroin for another customer (T 104-109).[10] In the latter part of February, Browning and petitioner cut another quarter of the "kilo" (T 109). Browning testified that, during the months of January through April, he sold about 51 ounces of heroin that he had obtained from petitioner (T 109-111), and that they shared about $10,000 to $12,000 from these sales. (T 111-112). In May of 1956, they terminated their partnership, shared the profits and split up the remaining half "kilo" which had not yet been sold (T 110, 112, 115-118, 121-122). Some time in early September 1956, after the termi-

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[9] Browning had received the $3,000 from his customer before petitioner had left to get the heroin, and had given him $1700 or $1800 of it as part of the investment to purchase the "kilo" (T 98-99).

[10] As Browning explained it, since petitioner kept "the plant"—the balance of the heroin—whenever he needed some he would contact him (T 104-105).

nation of the partnership, Browning purchased 5 "pieces" of heroin from petitioner (Count 5; T 124).

Following Browning's arrest in San Francisco on a federal narcotics charge in late 1956 (T 147, 151),[11] he informed the federal authorities that he had been getting the heroin from petitioner (T 148, 156), and advised them that he was planning to return to Los Angeles to buy narcotics from him (T 148). In late November or early December 1956, with $1800 in federally provided funds, Browning contacted petitioner and attempted to make a purchase. This deal fell through, however, after a number of meetings between the two men (T 122-132). These meetings took place under the surveillance of federal narcotic agents (See T 295-310, 490-501).

2. Shortly after the first sale to Winfrey in January 1956, it was arranged that petitioner would furnish him heroin directly (T 102, 118-119, 181-182, 200-202)[12]. According to Winfrey, starting some time in February 1956 (Count 4) until the end of that year, he purchased "stuff" from petitioner on about 10 different occasions. The amount of each purchase was approximately 3 ounces at $350 per

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[11] Browning thought he was arrested some time in late September or early October (T 151, 159), but James H. Mulgannon, an agent of the Bureau of Narcotics, stated that Browning was arrested on or about November 25, 1956 (T 359-360).

[12] On direct examination Winfrey stated that he had given petitioner the $700 owing on his January sale (T 205). On cross-examination, he stated that he was not certain whether he gave it to petitioner or petitioner's brother (T 234-235; see also T 254-255).

ounce (T 207-214, 215-216). Petitioner made delivery at various streets in Los Angeles (T 211-212, 217). At all of these deliveries, the "merchandise" in a white cellophane bag was handed to Winfrey's wife, who had accompanied him (T 217-218; see testimony of Celeste Winfrey, T 259-262). Similarly, on various dates in January and February 1957, and again on March 3, 1957 (Count 6), Winfrey purchased "stuff" from petitioner with the same arrangements as to amount, price and mode of delivery (T 220-223, 262). Winfrey stated that he resold the "stuff" at $200 an ounce, after "cutting" it with milk sugar (T 216-217).

On March 12, 1957, Mrs. Winfrey was arrested on a federal narcotics charge (T 223, 263-264, 357). After talking to federal narcotic agents, Winfrey spoke to petitioner about making another purchase of narcotics. He then had somewhat over $3,000, $2,100 of which was given him by the federal agents (T 224-225). He thereafter met with petitioner and discussed the possibility of a purchase (T 225-226). Petitioner, who knew of Mrs. Winfrey' arrest, asked why Winfrey had not told him of it, and informed Winfrey that he would let him know later about the narcotics (T 226). Winfrey spoke to petitioner on several occasions and was told to wait (T 226). They met again in June and July 1957 but no sale was consummated (T 227-232).[13]

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[13] Federal narcotic agent William C. Gilkey testified that he had kept petitioner and Winfrey under surveillance during two meetings they had in July 1957 (T 283).

The Defense:

The defense of petitioner, developed by trial counsel Paul Sweeney, had two main facets. First, Mr. Sweeney sought to discredit the testimony of the main government witnesses (Browning and the Winfreys). Secondly, he attempted to establish an alibi for petitioner on counts 5 and 6.

1. To achieve the first aim, he tested on cross-examination the version of events given by each of these witnesses (*Browning*: T 134-141, 142-144, 154; *Clarence Winfrey*: T 233-241, 246-248; *Celeste Winfrey*: T 273-274). Also, he questioned them as to their prior dealings with federal narcotic agents in this case: whether charges had been lodged against them; why, if they knew, they had not yet been brought to trial for their participation in these offenses with petitioner; whether they had been promised immunity or had been coerced into testifying against petitioner—in short, whether they had testified against petitioner solely in order to protect themselves from prosecution (see, *e.g.*, T 146-153, 155-163, 165, 168-169, 281, 241, 250-252, 267-272).

On his direct case,[14] Mr. Sweeney further pursued this tactic by calling various law enforcement officers as witnesses. On such examination, he brought out

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[14] At the close of the government's case, Mr. Sweeney had moved to dismiss each count of the indictment (T 350-354). His motion was granted as to count 2 (T 350). Also, on his motion, the testimony of federal agents as to what they had heard of conversations between Winfrey and petitioner, transmitted by a microphone hidden on Winfrey's person, was stricken by the trial judge (T 324-327).

that no case had yet been presented to a grand jury in relation to Mrs. Winfrey or Browning (See T 356-358, 359-360).[15]

2. As for the defense of alibi on counts 5 and 6, counsel examined petitioner, his wife, and his wife's daughter. In substance, their testimony was that for part of September, 1956 petitioner was in New York City (Count 5) and that on March 3, 1957 petitioner and his wife were in Mexico to get married (Count 6) (T 366-377, 386, 401-407, 433-434, 438-441). A photostatic copy of a hotel registration card, which Sweeney had himself obtained in New York, and a Mexican marriage license were introduced into evidence (T 363-364, 378-380, 438).

Petitioner further testified that, though Browning had contacted him in January 1956 concerning narcotics, he had never obtained any or sold any to him (T 410-420, 429-432, 448). As for his dealings with Winfrey, who had also asked him for heroin (T 459, 463), petitioner denied that their numerous meetings had anything to do with heroin transactions or that he ever obtained any for him (T 418-422, 424-429, 448).

3. The day following the jury verdict, Mr. Sweeney made a motion for a new trial (T 642-645). One of the grounds asserted was that the "defendant was

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[15] In this same connection, counsel sought to elicit on his examination of petitioner that he had been "badgered" by the government and offered "various propositions" by federal law enforcement officers "if he would get certain people for them" (T 444-445, 484-486).

not granted a reasonable continuance in order to secure additional counsel" (T 645). After denying the motion, Judge Hall stated (T 646):

> In connection with your comment on the last reason, that the defendant was substantially prejudiced and deprived of a fair trial by reason of the following circumstances, that the defendant was not granted a reasonable continuance in order for him to secure additional counsel, I have been a member of the bar since 1916, I have been on this bench since 1942, and I know of nothing that any other or additional counsel could have done that you, Mr. Sweeney, did not do in the protection of this defendant's rights.
>
> The case was tried skillfully and adroitly on behalf of the defendant by you, * * *.

ARGUMENT

Petitioner asserts that his trial counsel's emotional difficulties, stemming from counsel's involvement in a state narcotic charge[16] shortly before petitioner's trial, brings this case within the rule of *Glasser* v. *United States*, 315 U.S. 60, 70, which holds that effective assistance of counsel is denied where an attorney "simultaneously represent[s] conflicting interests" (Pet. 15-25). The rationale of *Glasser* has no application here. In that case, Glasser's personally retained counsel had been appointed by the trial judge to represent, in addition, one of the other co-

[16] The trial transcript indicates only that Mr. Sweeney was arrested on a bribery charge. The opinion of the Court of Appeals, however, does note that there was a narcotic charge (A 4).

defendants named in the conspiracy charge. Finding that, before such appointment, the trial court had been advised of the possibility of a divergence of interests between the two defendants, that, in fact, such conflict developed at the trial, and that counsel resolved such conflict by failing to do all he might in Glasser's defense, this Court reversed Glasser's conviction (315 U.S. at 72-76). In this case, however, there was no adverse interest that Mr. Sweeney was serving at the time he was supposed to be representing petitioner. He was not representing co-defendants whose interests conflicted—the situation in *Glasser* and other decisions relied upon by petitioner.[17] Nor had he represented, in another case, a witness against the defendant.[18] Nor was this a situation where trial counsel had represented the state in preliminary proceedings on the charge upon which he defended the accused at trial.[19]

What petitioner's contention really amounts to is that he had incompetent counsel; that his attorney, because of his personal difficulties, was not capable of representing him properly; and that for this reason the court should have granted him a further continuance to obtain other counsel. The circumstances set forth in the Statement are, we submit, an adequate answer. Petitioner's counsel had represented him

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[17] *Butzman* v. *United States*, 205 F. 2d 343 (C.A. 6) certiorari denied, 346 U.S. 828; *Craig* v. *United States*, 217 F. 2d 355 (C.A. 6).

[18] *District of Columbia* v. *Scott*, 214 F. 2d 860 (C.A. D.C.)

[19] *Berry* v. *Gray*, 155 F. Supp. 494 (W.D. Ky.).

for a considerable period of time and was thoroughly familiar with the case. There had been a number of continuances on petitioner's behalf. When the case was called for trial, two weeks after the attorney's arrest, petitioner did not appear with new counsel and ask for a continuance; he appeared with Mr. Sweeney and asked for more time to get new counsel. Under the circumstances the trial judge was justified in requiring the case to go to trial, giving petitioner the choice of using Mr. Sweeney or other counsel.

Furthermore, as the courts below held, the record shows that Mr. Sweeney conducted a vigorous defense in petitioner's behalf, both in cross-examining witnesses and in presenting affirmative evidence.

Petitioner relies upon two matters which, he claims, indicate that Mr. Sweeney's presentation was ineffectual. He contends, first, that counsel failed to make any demand under 18 U.S.C. 3500, for statements of government witnesses relating to their direct testimony (Pet. 25-26). But whether such demand should have been made was clearly a matter of trial strategy. Demanding production of statements and not using them would weaken, rather than aid, a defense. Secondly, petitioner asserts that counsel did not properly develop his defense of alibi, in that he sought to establish that petitioner was in New York at the time the illegal sale charged in count 5 was committed (on or about September 10, 1956) by introducing a letter from the manager of the hotel at which petitioner allegedly stayed, a document clearly inadmissible as hearsay and excluded as such, instead of making arrangements for the introduction of a deposition from

the manager of the hotel (Pet. 26-27). However, the original registration card showing petitioner's stay at the hotel, which was the best evidence, had been personally obtained by Mr. Sweeney in a trip to New York and was introduced into evidence on that point (T 363-364, 438).

In sum, an examination of the record shows that the courts below were warranted in concluding that "[t]he case was tried skillfully and adroitly on behalf of the defendant * * *" by Mr. Sweeney. (T 646; A 8-9).

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be denied.

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